

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRYAN OSMAN,	§	
	§	No. 491, 2010
Defendant Below,	§	
Appellant,	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	
	§	Cr. No. 0910005347
Plaintiff Below,	§	
Appellee.	§	

Submitted: February 9, 2011

Decided: April 5, 2011

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

ORDER

This 5th day of April 2011, upon consideration of the briefs of the parties, it appears to the Court that:

(1) Bryan Osman was found guilty, after a jury trial, of first degree robbery, possession of a firearm during the commission of a felony (“PFDCF”), and second degree conspiracy. He appeals only his PFDCF conviction, claiming it was not supported by sufficient evidence. We find no merit to the appeal, and affirm.

(2) On a Saturday morning, Robert Gailey walked to a gas station to buy soda and cigars. Gailey met Osman and two other young men outside the gas station, and Gailey agreed to buy some marijuana from Osman. After Gailey made his purchases at the gas station, he followed Osman and the other men to a nearby apartment complex, where Osman was going to get the marijuana.

(3) Gailey was waiting outside the building for about 25 to 30 seconds, when Osman came up behind Gailey, put his left arm around Gailey's throat and a gun to Gailey's head. Osman and the other two men rifled through Gailey's pockets and took some personal items. They then told Gailey to go to his house so they could take his electronics and/or money. Gailey went into a neighbor's house instead, and called 911. Osman and the other men became suspicious when Gailey failed to reappear, so they left the area.

(4) At trial, Gailey testified about Osman's gun:

Q: Can you please describe the gun.

A: It looked like I guess a .9-millimeter, the older .9-millimeter. The front was a little bit more rounder.

Q: . . . do you have any knowledge about the difference between handguns versus airsoft versus BB guns?

A: Yes.

Q: How were you about to distinguish between the gun that was up against your head and a BB gun or an airsoft?

A: I could tell the coldness of the metal. BB guns are generally plastic. It was coldness of the metal.

Q: Are you able to estimate the amount of time you were able to observe the gun?

- A: Probably about 5, 10 seconds. I seen it, even when he put it on the side, when he put it in his pocket . . .
- Q: That's later, after –
- A: Yeah. I didn't know if it was real or not. I'm not going to take that chance, if it's not a real gun or it's a real gun.
- Q: But you made some mention as to seeing the barrel?
- A: Yes.
- Q: What about the barrel? Can you tell us or explain the barrel as it distinguishes between a BB gun or an airsoft gun or a real gun?
- A: I believe the airsoft gun has little tips on it, and I can't tell if it looks fake or whatever, but I could see the barrel. It was a real gun.¹

On cross-examination, Gailey equivocated:

- Q: Now, you indicated you thought that was a real gun?
- A: No. I wasn't going to take that risk if it was a gun or not a gun or whatever.
- Q: But you're not really sure it's a gun, correct?
- A: It was a gun, yeah. I couldn't tell you if it was a BB gun or a real gun or a stun gun or whatever.
- Q: But you don't know whether it was a BB gun, stun gun, toy gun, pellet gun or a real gun, correct?
- A: Yeah.²

Osman also took the stand, and, after describing his version of the events, testified that he had no gun.

¹ Appellant's Appendix, A-22.

² Appellant's Appendix, A-27.

(5) On appeal, Osman claims there was insufficient evidence to support his PFDCF conviction. Because he did not raise this claim in the Superior Court, we review for plain error, which is error “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial”³ We find no plain error.

(6) The jury, as the trier of fact, “is responsible for determining witness credibility, resolving conflicts in testimony and for drawing any inferences from the proven facts.”⁴ “A person who is in possession of a firearm during the commission of a felony is guilty of [PFDCF].”⁵ A “firearm” “includes any weapon from which a shot, projectile or other object may be discharged by force of combustion, explosive, gas and/or mechanical means, whether operable or inoperable, loaded or unloaded. It does not include a BB gun.”⁶

(7) Osman argues that, because the only evidence of any type of weapon came from Gailey, and because Gailey conceded that it could have been a toy gun, the conviction must be overturned. We disagree. The jury was free to believe Gailey’s testimony that it was a real gun, and to ignore his doubts. There is no requirement that the actual weapon be entered into evidence, and there is no requirement that a second witness corroborate Gailey’s testimony.

³ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

⁴ *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992).

⁵ 11 Del. C. § 1447A(a).

⁶ 11 Del. C. § 222(12).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice